Supreme Court, U.S.
FILED
OCT 25 1963
JOHN F. DAVIS, CLERK

No. 444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

KOHN, INC., THE KOHN BEVERAGE CO.,
PAULINE KOHN, ADAMS J. KOHN,
STEPHEN ZARICH and PETER ZARICH,
Respondents.

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

THE STROH BREWERY COMPANY and
MORTON R. ENGEL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS STROH BREWERY COMPANY AND MORTON R. ENGEL IN OPPOSITION

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BRIEF FOR RESPONDENTS STROH BREWERY COMPANY AND MORTON R. ENGEL IN OPPOSITION

Respondents, Stroh Brewery Company and Morton R. Engel, oppose the granting of certiorari herein on the ground that there is no special or important reason for granting certiorari and, specifically, that the decision of the Court of Appeals relates solely to the sufficiency of the unique Complaint involved herein, does not conflict with

applicable decisions of this Court or of other Courts of Appeals and that no important question of federal law is presented.

OPINIONS BELOW

Petitioner, as plaintiff, instituted two successive actions in the same District Court against Respondent Stroh.* The first, No. 35,300, was filed on May 11, 1959, and the second, No. 35,365, on June 11, 1959. Denial of preliminary injunction in each was previously appealed to the Court of Appeals (Nos. 14,025 and 14,026). The Court of Appeals affirmed the denials without opinion at 280 F. 2d 424.

After remand, and after discovery and pretrial, the District Court dismissed cause 35,365. The opinions as to the District Court's dismissal and as to the affirmance thereof by the Court of Appeals are noted in the Petition. The opinion of the Court of Appeals is reported at 318 F. 2d 283.

QUESTIONS PRESENTED

1. Whether Petitioner's Complaint in cause 35,365 states a claim for treble damages under Section 1 of the Sherman Act, or whether Petitioner's only claim is his prior claim for simple and punitive damages for common law tort asserted in pending cause 35,300.

2. Whether a claim under Section 1 of the Sherman Act is stated in a Complaint alleging that:

a. Petitioner was incorporated solely to distribute Respondent's products. Petitioner's only business was the distribution of such products, and Petitioner was the exclusive distributor for such products but only in two counties, each in the State of Ohio.

*Hereinafter referred to as "Respondent," Respondent Engel being an employee of Stroh.

b. Respondent, whose right to do so is conceded herein by Petitioner, terminated Petitioner as such distributor and substituted a new distributor as the only Stroh distributor in the two counties.

c. The new distributor acquired Petitioner's manager, a route superintendent of Petitioner's parent corporation and some of Petitioner's employees and in so doing allegedly committed common law torts.

d. Said termination of Petitioner and claimed wrongful acquisition of Petitioner's employees were the result of a "conspiracy" between Respondent and the substituted distributor.

3. Whether the decision of the Court of Appeals presents any special or important reason justifying certiorari.

STATUTES INVOLVED

Petitioner's claims under Section 2 of the Sherman Act were abandoned on appeal, Section 2 is not involved and should not have been included in the Petitioner's Appendix.

STATEMENT OF THE CASE

Until the dismissal order complained of, Petitioner had pending two actions against Respondent in the same District Court. The Complaints were essentially the same, each alleging the same operative facts and each seeking to enjoin Respondent from selling beer to the new distributor. Petitioner's first action (Cause 35,300) was filed May 11, 1959, was grounded on diversity, claimed no adequate remedy at law, characterized the claimed wrongful acts as a "tortious destruction of Plaintiff's business" and sought simple and punitive damages. Petitioner's second action (Cause 35,365) was filed June 3, 1959, asserted that it was grounded on the

Sherman and Clayton Acts, and sought treble damages. The first action is still pending. Certiorari is sought as to the affirmance of the dismissal of the second. The Complaint in the first action is printed herein at Appendix pages A1-A8, *post*, and the Complaint in the second at pages 5a-12a of Petitioner's Appendix Record On Appeal filed herein.

The second Complaint* does not allege that after the substitution of distributors Petitioner ever distributed, or intended to distribute, or had any prospect of distributing, beer in interstate or intrastate commerce. To the contrary, the Complaint affirmatively alleges that Petitioner was formed solely to distribute Stroh beer, distributed only Stroh beer and that Petitioner's only business was as the exclusive Stroh beer distributor for Mahoning and Trumbull Counties, each in the State of Ohio (Paragraphs 8 and 11; pages 6a-7a).

The Complaint does not allege that Petitioner and the new distributor were competitors in the distribution of Stroh beer. To the contrary, it alleges that Petitioner was the exclusive distributor for the counties involved, that the new distributor was a newcomer to the market area and was formed to distribute Stroh beer in said counties, that Petitioner's franchise was cancelled and Respondent "then promptly commenced selling" to the new distributor and that Petitioner's business was destroyed (Paragraphs 8, 14(b), 15, 17; pages 6a, 7a, 8a, 10a).

Nor does the Complaint allege that Petitioner and the new distributor were competitors in the distribution of any other beer. To the contrary, it alleges that Petitioner was formed solely to distribute Stroh beer, Stroh was its "sole source of supply of merchandise for distribution and sale" and that the new distributor was formed for the same

*Hereinafter meaning the Complaint in Cause 36, 365.

limited purpose and replaced Petitioner (Paragraphs 8, 11, 15; pages 6a, 7a, 10a).

Nor does the Complaint allege that Petitioner was, or had any intention of becoming, or had any prospect of becoming, in any way a competitor of Respondent or of the new distributor. Although Petitioner now argues as if competition were involved and as if trade were restrained, the Complaint that Petitioner actually filed shows on its face that Petitioner's sole business was as an exclusive distributor for a single product, that this business was transferred to a newcomer who entered the area, and that Petitioner's business terminated. Fairly read in its entirety the Complaint alleges only the natural consequences of the substitution as the only effects upon trade or commerce. Petitioner concedes that the transfer of the franchise from one distributor to another was Respondent's right (Petition, pages 11-12). The Complaint seeks, as does the still pending prior Complaint, damages for alleged common law torts of piracy of employees and records, and of inducing breaches of fiduciary duty, but by claiming, and seeking damages for, a claimed total destruction of its business Petitioner has affirmatively alleged itself out of the area of active trade, commerce and competition to which the Sherman Act is directed.

The District Court summarized the situation:

> "The practical result of all the events narrated is the substitution of one distributor for another. We cannot find in this a lessening of competition, a restraint of trade, or an injury to the public. Abstracting from personalities, how has the economic picture been changed? There still remains one distributor no more nor less free to dictate the condition of the market. An economist's chart of distribution would

remain unchanged. The Sherman Act deals with the economic realities of the market and not with the personalities involved. There is no claim stated under Section 1 of the Sherman Act." (Page 33a of Appendix Record on Appeal filed by Petitioner).

The Court of Appeals likewise summarized the situation:

"• • • Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the anti-trust laws is the sole issue in this case. In that connection it is well settled that tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act. • • • (citing cases)" (Appendix to Petition, page 31).

• • •

"The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area after the change in distributors as it was before. See: *United States* v. *E. I. du Pont de Nemours & Co.*, 351, U.S. 377." (Appendix to Petition, pages 32-33).

• • •

"It is well settled that the 'restraint of trade' referred to in Section 1 of the Act, means only unreasonable restraint of trade, in that, as the cases point out, every commercial contract has some restraining effect upon trade. • • • (citing cases) The substitution of one distributor for another in a competitive market of the kind herein involved does not

eliminate or materially diminish the existing competition of distrbutors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restrain of trade. * * * (citing cases)." (Appendix to Petition, page 33).

ARGUMENT

The decision of the Court of Appeals sets forth at length the particular, and unique, allegations of the Complaint. It expressly reserves judgment as to "whether a right of damages exists in some other action." It notes that there was one distributor for Stroh beer both before and after the change, and that "there is no allegation or contention that the beer of other breweries was not just as available in that area after the change in distributors as it was before." It concludes only that the District Judge was not in error in dismissing this particular Complaint. The decision is carefully and narrowly confined. It presents no conflict with decisions of this Court or of other Courts of Appeals, no important questions of federal law and no special or important reasons justifying certiorari. For Petitioner it means it is tied to the form of action it initially selected and to the theory that it actually alleged in both Complaints.

The burden of bringing its action within the ambit of Section 1 of the Sherman Act is upon Petitioner. If Petitioner's claim, fairly read, is not that interstate trade or commerce was restrained, Petitioner has not stated a claim under that act, regardless of whether or not Petitioner has stated some other kind of a claim. Herein, Petitioner, of necessity, concedes that the substitution of exclusive distributors was Respondent's right. The business Petitioner thereby lost was Petitioner's sole business and Section that of the newcomer in the market. This, as both lower courts noted, was a mere substitution and by its nature could have no effect on interstate trade or commerce.

"As I see it, this is one of those cases, not unfamiliar in treble-damage litigation where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms." Justice Harlan, dissenting, in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 478.

In an effort to place upon Respondents the burden of negating Sherman Act consequences that Petitioner has not even alleged, Petitioner has throughout, and particularly in his Petition herein, taken the position that such consequences are assumed in any refusal to deal case unless it appears that the refusal was a mere "unilateral refusal to deal 'without more'" (Petition, page 11). From this springboard, Petitioner jumps to the conclusion that its allegations of "conspiracy" and of *intra*state common law torts as between the market newcomer and the supplanted distributor (with, perhaps, personal but certainly not interstate commerce consequences) are a magic "more", and that Respondent therefore cannot sustain its presumed burden. On this assumed basis, Petitioner then claims that the decision below conflicts with those decisions where the Complaints involved clearly did charge a conspiracy to restrain, or a "more" which restrained, interstate commerce.

I

The decision below does not conflict with the decisions of this Court.

Poller v. Columbia Broadcasting System, 368 U.S. 464, 7 L.ed 2d 458, 462, relied upon by Petitioner at pages 13, 14, 16 and 25 of its Petition, is not in point. The only question was the propriety of summary judgment. The sufficiency of the Complaint under Sections 1 and 2 of the Sherman Act was beyond question. It squarely alleged an interstate, in fact a nationwide, restraint and attempt to monopolize:

> . . . A conspiracy is alleged to restrain trade in the Milwaukee television market; to eliminate WCAN from that market; to secure its facilities at depressed prices; and to occupy the UHF band in that market exclusively. The right of cancellation was merely one of the means used to effectuate this con

> spiracy. Moreover, 'in its wider sense' Poller claims that a part of their conspiracy was 'to wipe out the most outstanding UHF operator in the country [WCAN] and by wiping him out they destroyed the UHF industry, which was a threat to them, despite their protestations, because of the enormous economic investment they had in VHF.'
>
> . . .
>
> It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.'"

The incomplete quotation emphasized by Petitioner at page 14 of its Petition clearly identifies the "violations of the anti-trust laws" referred to in the quoted portion by referring, in the portion *not* quoted, back to the claims hereinabove set forth and to the "additional claim that part of the conspiracy was the destruction of UHF broadcasting entirely."

Had the lower courts herein found that Petitioner had alleged that the termination of Petitioner was part of a plan to eliminate all competing *beers* in the Youngstown market, and ultimately in the national market, and had then concluded that no claim under the Sherman Act had been alleged the decision then would have conflicted with the decisions of this Court. Both lower courts, however, found that no such, or similar, claim had been made and, to the contrary, that the result of all that was pleaded in the Complaint was the claim of substitution of one distributor for another with no other claimed effects on the market. In particular, Petitioner's paraphrase of *Poller* at page 14 of its Petition is squarely contrary to the facts herein.

Petitioner's attempt to characterize the decision of the court below as based on a "public jury" requirement is

clearly an attempt to set up, and then destroy, a false premise (Petition, page 13). The court said that Stroh had one distributor before the substitution and one after; that Petitioner does not claim that the availability of other beers was affected by the substitution, and that the substitution of one distributor for another in a competitive market is not a restraint of trade under the Sherman Act where it does not affect competition. This is not a requirement of "public injury." It is a requirement that trade, commerce or competition be somehow alleged to be affected before a Sherman Act violation is indicated. It is only a conspiracy "in restraint of trade or commence" which 1 of the Sherman Act strikes down (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, Footnote 59).

In fine, the decision below not only does not conflict with, but clearly recognizes, that had the substitution complained of been alleged to have been part of any plan unreasonably to restrain trade or commerce an antitrust violation would have been alleged, whether the plan involved price fixing,[1] group boycott,[2] group boycott and conspiracy to monopolize,[3] attempt to monopolize,[4] price fixing and territorial and customer limitations,[5] tie-in arrangements,[6] discriminatory prices,[7] conspiracy to monopolize and to restrain trade

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[1] *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, Petition, page 15 and *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, Petition, page 16.
[2] *Loewe v. Lawlor*, 208 U.S. 274, Petition, page 13, *Radiant-Burners, Inc. v. People's Gas, Light & Coke Co.*, 364 U.S. 656, Petition, page 20; *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, Petition, pages 15, 20 and *Binderup v. Pathe Exchange*, 263 U.S. 291, Petition, pages 12, 13.
[3] *Radovich v. Nat. Football League*, 352 U.S. 445, Petition, page 15.
[4] *Lorain Journal Co. v. U.S.*, 342 U.S. 143, Petition, page 15.
[5] *White Motor Company v. U.S.*, 372 U.S. 253, Petition, page 25.
[6] *Northern Pacific Ry. Co. v. U.S.*, 356 U.S. 1, Petition, page 13.
[7] *Federal Trade Comm. v. Sun Oil Co.*, 371 U.S. 505, Petition, page 25.

and destroy an entire industry,[8] an agreement not to compete and a conspiracy to preclude purchasers from buying in open market,[9] or a tie-in arrangement and attempt to monopolize.[10]

The foregoing categories and the footnoted list of cases include all of the decisions of this Court relied on by Petitioner. Each involved a classic example of restraint of trade or of monopolization or of violation of the Robinson-Patman Act. The decision below that the substitution of one distributor for another distributor without other alleged restraint of trade, monopoly or antitrust effects clearly is not in conflict with any of these decisions.

II.

The decision below does not conflict with the decisions of other Courts of Appeals.

Petitioner cites general language from four claimed conflicting decisions. Inspection of the decisions, however, reveals that the Complaints involved squarely charged precisely what the courts below have found the Complaint herein did not, a violation of the antitrust laws.

Mitchell Woodbury Corporation v. Albert Pick-Barth Co. Inc., (CCA 1, 1930) 41 F.2d 148, 149-151.

"The declaration alleges that the plaintiff was engaged in interstate commerce; that the defendant corporation was one of a combination of corporations * * * engaged in the same business as the plaintiff, and constituted the largest and a dominating factor in that trade throughout the United

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[8] *Poller v. Columbia Broadcasting System*, 368 U.S. 464. Petition, pages 13, 14, 16, 25.

[9] *U.S. v. Yellow Cab Co.*, 332 U. S. 218. Petition, page 12.

[10] *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594. Petition, pages 13, 15-16

States; * * * that said defendants entered into conspiracy to deprive the plaintiff of its interstate business in its kitchen equipment and utensils, and to restrain the competition of the plaintiff with the defendant corporation and destroy its business in the several states, * * * the fair inference is that it was its interstate kitchen department business that it alleges was injured and diminished.

"* * * the defendant corporation is, in effect, charged, in conjunction with the other defendants, with a purpose, and acts in furtherance of that purpose, of eliminating the plaintiff as an interstate competitor.

"It can hardly be said that allegations that the defendants entered into a conspiracy to restrain the competition of the plaintiff in trade and commerce among the several states, and to deprive it of its business and to obtain that business for the defendant, do not charge with substantial certainty an intent to restrain commerce and the full and free flow of interstate competition. " * * (citing cases)"

Atlanta Heel Co., Inc. v. *Allied Heel Co.*, (CA 1, 1960) 284 F.2d 879, 880, 884-5.

"Plaintiff appellant, Atlantic Heel Co., Inc., filed a complaint alleging that plaintiff is a Massachusetts corporation engaged in the manufacture and sale of leather and leatherboard heels; * * * and has a substantial share of the interstate business in the related lines of merchandise.

"The complaint further alleges that defendants conspired and are conspiring to restrain the plaintiff in its interstate and foreign business, more particularly that defendants conspired to destroy plaintiff in its interstate and foreign business, * * * that course of action undertaken by defendants has had and will have the effect of eliminating plaintiff from and restraining plaintiff in its position as one of the leading concerns in the supply of leather and leather

board heels; that such elimination and restraint will injure the interests of the public and the trade * * * with a resultant harmful effect on prices and on the availability of choice to customers in the trade. * * *"

"Woodbury, Chief Judge, and Aldrich, Circuit Judge (concurring).

"Judge Aldrich and I concur in the result but see no occasion at this stage of the case to express wholehearted endorsement of the rule laid down by this court in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 1 Cir., 1932, 57 F.2d 96, 102. It may be that the case is good law but it was unique on its facts in 1932 and so far as we can determine it stands alone today. At this stage of the instant case there is no need for us to commit ourselves definitely on the Pick-Barth rule."

Syracuse Broadcasting Corporation v. *Newhouse*, (CA 2, 1956) 236 F.2d 522, 524-525.

"This action is predicated on the following alleged violations of the antitrust laws: (1) Restraining trade in, monopolizing, and attempting to monopolize the dissemination of news and advertising in the Syracuse area in violation of 15 U.S.C.A. §§1 and 2 (Sherman Act) by means of the following acts: (a) refusing to accept newspaper advertisements unless WSYR also received advertising; (b) refusing to accept national or 'general' advertising in either newspaper separately, but requiring unit or combination advertising in both newspapers; (c) circulating false statements concerning WNDR; and (d) providing advantages in the newspapers to WSYR which were not provided to WNDR, such as favorable publicity, free advertising, preferred page position for advertising and secret refunds and rebates. (2) Discriminating in price, by means of the above-stated acts, in violation of 15 U.S.C.A. §13 (Clayton Act). (3) Merging and employing interlocking direc-

torates in violation of 15 U.S.C.A. §§ 18 and 19 (Clayton Act). * * * ".

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, (CA.9, 1960) 284 F.2d 1, 5.

"Appellees allege in their first cause of action (Section 1 of the Sherman Act; 15 U.S.C.A. §1), and appellants deny, that appellants have conspired and entered into contracts which had the purpose and effect of unreasonably restraining interstate commerce in canned California citrus fruit juice, particularly single strength orange juice. This was proved, say appellees, by 'six acts.' * * *" [The six acts include discrimination in services, prices and contracts].

III.

The decision below is clearly correct.

An alleged wrong does not become a Sherman Act violation merely because it is inflicted on one engaged in commerce or because it impairs or destroys his competitive ability.

Apex Hosiery Co. v. *Leader*, 310 U.S. 469, 486-487, 84 L. ed 1311, 1319.

Hunt v. *Crumboch*, 325 U.S. 821, 826, 89 L. ed 1954.

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 L. ed 464.

A substitution of one distributor for another with no other effect on the market involved, or upon trade, commerce or competition therein, has no Sherman Act consequences, although it may have serious personal consequences to the distributors involved.

Schwing Motor Company v. *Hudson Sales Corporation*,

138 F. Supp. 899, affirmed 239 F.2d 176, certiorari denied 355 U.S. 823.

Packard Motor Car Company v. *Webster Motor Car Company*, (CA DC, 1957) 243 F.2d 418, certiorari denied 355 U.S. 822.

Parmelee Transportation Company v. *Keeshin*, (CA 7, 1961) 292 F. 2d 794, 804, certiorari denied 368 U.S. 944, rehearing denied 368 U.S. 972.

> "* * * However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs."

It is respectfully submitted that Certiorari should be denied.

Respectfully submitted,

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Dated October 25, 1963

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ACE BEER DISTRIBUTORS, INC.
an Ohio corporation
58 Hubbard Road
Youngstown, Ohio

Plaintiff.

—vs.—

No. 35,300

STROH BREWERY COMPANY, INC.
an Arizona corporation,
909 East Elizabeth Street
Detroit, Michigan

Defendant.

COMPLAINT

(Filed May 11, 1959)

1. This action arises by reason of diversity of citizenship by and between the plaintiff, a corporation organized under the laws of, and doing business in, the State of Ohio, and which is a citizen of the State of Ohio, and the defendant, Stroh Brewery Company, Inc., a corporation organized under the laws of the State of Arizona, which is a citizen of the State of Arizona, and having its principal place of business at 909 East Elizabeth Street, Detroit, Michigan. At all times herein referred to defendant has been doing business in the State of Ohio. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

2. Plaintiff is a wholly owned subsidiary of the Genesee Distributing Co., an Ohio corporation, hereinafter referred to as "GENESEE".

FIRST CAUSE OF ACTION

3. Since the year 1936 Genesee and defendant had been operating under an agreement wherein plaintiff was designated the exclusive distributor in Mahoning and Trumbull Counties, Ohio, of beer and other products manufactured by defendant. Said agreement was to be in full force and effect for an indefinite term. In January of 1956 Genesee and defendant agreed that Genesee would set up a separate sales division to distribute Stroh products exclusively. Defendant insisted that plaintiff cause the incorporation and formation of plaintiff as a separate company and agreed that upon its incorporation plaintiff would be substituted for Genesee as the exclusive Stroh distributor in Mahoning and Trumbull Counties, Ohio, with all the rights and obligations which had devolved upon Genesee as a Stroh distributor. In accordance with defendant's demands Genesee caused plaintiff to be formed and incorporated on January 4, 1958 and plaintiff thereupon was substituted for Genesee as the exclusive Stroh distributor for Mahoning and Trumbull Counties, Ohio.

4 Plaintiff fulfilled every requirement of its distributorship agreement with defendant and exerted its best efforts to sell and promote the sale of defendant's products. To that end plaintiff incurred considerable sales and advertising expenses.

5. In reliance on its distribution agreement with the defendant, plaintiff leased a warehouse building at 58 Hubbard Road, Youngstown, Ohio. Plaintiff purchased a cooler,

warehouse equipment and office equipment for this building, leased trucks and tractor-trailer, and obtained liquor permits from the Ohio Department of Liquor Control and from the United States Treasury Department.

6. Defendant was the only company for which plaintiff acted as a distributor. Defendant was plaintiff's sole source and supply of merchandise for distribution and sale.

7. Plaintiff sold Stroh products at an annual rate of between Seven Hundred Thousand Dollars ($700,000.) and Seven Hundred Fifty Thousand Dollars ($750,000.). The net profit before taxes and after all other costs and expenses ranged between three per cent (3%) and four per cent (4%) of gross sales.

8. On April 13, 1959, Sanford Y. Lipton, one of plaintiff's officers, heard rumors that defendant was planning to cancel plaintiff's distribution franchise. At that time, Sanford Y. Lipton was away from Youngstown, Ohio, on vacation. He thereupon called Morton R. Engel, defendant's Sales Representative for the State of Ohio, by long distance telephone to inquire into the truth of these rumors. Engel advised Lipton that the rumor was without basis, that plaintiff was still the Stroh distributor for Mahoning and Trumbull Counties, Ohio, and that its position as a distributor was secure. Subsequently, on April 17, 1959, Lipton met with Engel in Cleveland, Ohio. Engel, at that time, confirmed his earlier statement that plaintiff was still the Stroh distributor and had nothing to fear.

9. On April 20, 1959, without giving plaintiff any prior notice whatsoever, defendant cancelled plaintiff's distribution franchise to be effective immediately.

SECOND CAUSE OF ACTION

10. Plaintiff says that *for many months* prior to April 20, 1959, the defendant and The Kohn Beverage Co., an Ohio corporation with its principal place of business in Akron, Ohio, Pauline Kohn, a.k.a. Mrs. R. K. Yellig, an officer and stockholder of The Kohn Beverage Co., Adam J. Kohn, a.k.a. Charley Davis, an officer and stockholder of The Kohn Beverage Co., and Morton R. Engel, defendant's Ohio Sales Representative, *tortiously and maliciously conspired and confederated together to destroy plaintiff's business, good will and organization;* to appropriate it for themselves and to interfere with plaintiff's advantageous, cordial and harmonious relationsh p with its employees and customers.

11. To that end, defendant and its co-conspirators secretly agreed that defendant would cancel plaintiff's distribution franchise without giving notice to plaintiff, and would simultaneously issue a new franchise to a corporation to be formed by its co-conspirators.

12. Pursuant to this conspiracy, co-conspirators caused Kohn, Inc. to be incorporated on March 30, 1959. On information and belief, plaintiff says that Kohn, Inc. is an undercapitalized corporation; that it is a mere instrumentality of defendant's co-conspirators and subject to their complete will, control and direction, and that it was formed for the sole purpose of furthering the conspiracy as aforesaid.

13. On April 1, 1959, defendant's co-conspirators secured a year's lease for a suitable building in the Youngstown area for the Kohn, Inc. operation. This building is located at 3825 Belmont Avenue Extension, Liberty Township, Trumbull County, Ohio. Defendant's co-conspirators further obtained a fleet of trucks which were placed in readi-

ness to commence operations in the Youngstown area as soon as defendant cancelled plaintiff's franchise and issued a new franchise to Kohn, Inc.

14. In furtherance of this conspiracy, the defendant and its co-conspirators contacted plaintiff's warehouse manager, Stephen Zarich, a long trusted and key employee, and also contacted his brother, Peter Zarich, Genesee's route supervisor, a long trusted and key employee, for the purpose of inducing said Stephen Zarich and Peter Zarich to leave their employment and to join the staff of Kohn, Inc. as participants in the conspiracy aforesaid. Said Stephen Zarich and Peter Zarich were each given a one-third (1/3) interest in the profits of Kohn, Inc. as an inducement to enter into the conspiracy.

15. Stephen Zarich and Peter Zarich thereupon joined the conspiracy. At the request of defendant and its co-conspirators, said Stephen Zarich and Peter Zarich contacted each of plaintiff's truck drivers and salesmen to induce the said employees to leave plaintiff en masse; to become employed by Kohn, Inc.; and to take with them all plaintiff's documents, records and files containing secret and confidential information respecting customers, routes, sales and defendant's promotions. On April 20, 1959, immediately after defendant's cancellation of plaintiff's distribution franchise, said Stephen Zarich and Peter Zarich left their respective employments without any notice to their respective employers. All but three (3) of plaintiff's drivers and salesmen suddenly without notice to plaintiff quit its employ on that day and immediately began employment with Kohn, Inc.

16. On April 20, 1959, *defendant tortiously, maliciously and in furtherance of the conspiracy, cancelled plaintiff's franchise* for the distribution of Stroh products. Defendant

then promptly commenced selling Stroh merchandise to Kohn, Inc.

17. Defendant sold beer to Kohn, Inc. before Kohn, Inc. had even applied for a basic permit from the United States Treasury Department for the sale of alcoholic beverages.

18. Defendant, its co-conspirators and plaintiff's former drivers and salesmen immediately made contact with all of plaintiff's customers in an effort to interfere with and destroy plaintiff's well established, enviable relationships with these customers and to appropriate said customers for their own enterprise.

19. Plaintiff says that the defendant and its co-conspirators have completely destroyed plaintiff's business, organization and good will and are contacting plaintiff's employees and customers to entice them away from plaintiff. Plaintiff says that said conduct by the defendant and its co-conspirators is causing great and irreparable damage to plaintiff.

20. Plaintiff says that it has no adequate remedy at law; that unless defendant is restrained and enjoined from the willful and tortious destruction of plaintiff's business and from the willful interference with plaintiff's relations with its customers and employees, plaintiff will suffer great and irreparable damage.

21. WHEREFORE, plaintiff prays that:

A. Summons issue from this Honorable Court upon the defendant.

B. After notice a preliminary injunction be issued by this Honorable Court against the defendant restraining said defendant from participating directly or indirectly in the conspiracy to destroy plaintiff's business, good will and organization and interfering with plaintiff's

advantageous relationships with employees and customers by doing any of the following acts:

(1) Refusing to sell beer and other merchandise to plaintiff for sale and distribution in Mahoning and Trumbull Counties, Ohio.

(2) Selling beer and other merchandise to or otherwise doing business with Kohn, Inc. or any other person, persons or corporation for distribution in Mahoning and Trumbull Counties, Ohio.

(3) Contacting or employing any of plaintiff's present or former employees.

C. After trial a permanent injunction be issued by this Honorable Court against the defendant restraining said defendant from participating directly or indirectly in the conspiracy to destroy plaintiff's business, good will and organization and interfering with plaintiff's advantageous relationships with employees and customers by doing any of the following acts:

(1) Refusing to sell beer and other merchandise to plaintiff for sale and distribution in Mahoning and Trumbull Counties, Ohio.

(2) Selling beer and other merchandise to or otherwise doing business with Kohn, Inc. or any other person, persons or corporation for distribution in Mahoning and Trumbull Counties, Ohio.

(3) Contacting or employing any of plaintiff's present or former employees.

D. Plaintiff be awarded compensatory damages on its first and second causes of action in the amount of Two Hundred Fifty Thousand Dollars ($250,000.).

E. Plaintiff be awarded punitive damages on its second cause of action in the amount of Five Hundred Thousand Dollars ($500,000.).

F. By reason of defendant's wilfully tortious conduct, this Honorable Court award to plaintiff the costs and counsel fees incurred by it in this action; and

G. Plaintiff have such other and further relief which to this Honorable Court may seem just and equitable in the premises.

MENDELSOHN, KROTINGER & LANE
Attorneys for Plaintiff
218 Chester-Twelfth Building
Cleveland 14, Ohio TO 1-1820
By: MYRON N. KROTINGER.

STATE OF OHIO
MAHONING COUNTY } ss.

SANFORD Y. LIPTON, being first duly sworn, says that he is an officer of the Ace Beer Distributors, Inc., the plaintiff in the within entitled action; that he has read the complaint in this action; that the allegations therein set forth are true except such allegations as are made upon information and belief, and he believes them to be true.

SANFORD Y. LIPTON

SUBSCRIBED and SWORN To before me this 9th day of May, 1959.

ROBERT B. WEIMER
Notary Public
My Commission Expires September 13, 1961.